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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL LEE,

Petitioner,

vs.

BERNT A. MONSEN, Deputy Chief of the Elmhurst Police Department, and CITY OF ELMHURST, ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

In a civil rights action brought under 42 U.S.C. § 1983 upon facts *in pari materia* with a common law tort, the defenses available to that common law tort are also available in a civil rights action.

ARGUMENT

I.

THE "STIGMA PLUS" TEST WAS PROPERLY APPLIED BY THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE.

A liberty interest of the ilk asserted by Lee must "occur in the course of the termination of employment." *Paul v. Davis*, 424 U.S. 693, 710 (1976). In this case, a period of *over one year* transpired between Lee's resignation and the allegedly defamatory remarks. As to such a length of time, the U.S. Court of Appeals held below:

> However, there comes a point in time when post-termination publication of defamatory remarks becomes sufficiently remote from the termination of employment so as to eliminate the nexus required by the "stigma plus" test.

Relative to this ruling Lee argues:

> However, the United States Court of Appeals * * * determine[d] that there must be a nexus between the post-termination publication of the defamatory remarks that is not sufficiently remote from the termination of employment.

The issue raised by Lee is whether the elapsing of one year's time from his departure from the police department to the time of alleged stigmatization satisfies the requirment that it "occur in the course of the termination of employment."

Lee would automatically apply Ill.Rev.Stat., ch. 83, § 16—the statute of limitations applied in statutorily based claims. However, as this Court stated in *United States v. Kubrick*, 444 U.S. 109, 115 (1979):

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

The statute of limitations is a statute of repose and does not define the elements of causes of action whether constitutional or common law. The five-year limitation determines the time from the incurrence of injury that the cause of action must be brought. It does not define the time relationship required under the Constitution or common law for maintenance of this action.

As the U.S. Court of Appeals for the Seventh Circuit said in *Hadley v. County of Du Page*, 715 F.2d 1238, 1246 (7th Cir. 1983):

> [t]here comes a point in time when post termination publication of defamation becomes sufficiently remote from the termination itself so as to make it no longer within "the course of termination of employment", thereby eviscerating the nexus required by the stigma plus test.

That standard is consistent with the spirit and tenor of this Court's prior rulings in *Paul v. Davis*, 424 U.S. 693 (1976) and *Codd v. Velger*, 429 U.S. 624 (1977). The Court below properly ruled that, as a matter of law, a putative stigmatization which occurred one year after a voluntary

resignation was *not* within the "course of termination of employment".

II.

A LIBERTY INTEREST IS SUBJECT TO THE SAME DEFENSES AS EXISTED AT THE COMMON LAW UPON FACTS *IN PARI MATERIA*.

As a second basis upon which the Petitioner seeks to have this Court grant *certiorari* Lee argues:

> Libel and slander are causes of action that relate to different type legal theories which are not liberty interest concepts that are founded upon constitutional grounds.
>
> * * *
>
> Therefore, the qualified privilege should not be the basis to bar a civil rights violation in terms of a liberty interest deprivation when there is more involved than an adverse publication affecting one's reputation—such as loss of employment resulting in a denial of a liberty.

Lee thus argues that common law defenses to libel and slander actions are of no import in liberty interest violations upon facts *in pari delicto*. For pall-mall abrogation of common law immunities to occur it would have had to have been *intended* by the legislature that passed 42 U.S.C. § 1983.

The legislative record gives no indication, however, that Congress, in passing 42 U.S.C. § 1983, intended to abrogate common law immunities as they then existed. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Instead, 42 U.S.C. § 1983, which was passed in 1871, has been held by this Court *not* to be read in derogation of common law tort immunities and defenses. This Court has instructed that 42 U.S.C. § 1983 is to be read *in harmony* with those immunities and defenses. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *Imbler v. Pachtman*, 424 U.S.

409, 418 (1976). Thus, those defenses available at the common law in 1871 are available under 42 U.S.C. § 1983, today, upon facts *in pari materia*. *See, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

Relative to defenses to libel and slander actions, this Court long ago recognized in *White v. Nicholls*, 44 U.S. (3 How.) 226 (1845) certain "exceptions" or defenses to actions for libel and slander. The Court, after conducting an examination of the treatises and decisions, found among the "exceptions":

> 2. Anything said or written by a master in giving the character of a servant who has been in his employment. (*Id.* at 287)

In *White* the Court also found the state of the law as it then existed to be that a defense was offered whenever an:

> author or publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral * * *. (*Id.* at 286)

These statements give proof of the birthright of both "good faith" and qualified privilege immunities for charges of libel concerning applicants for employment.

Further support of the long standing existence of these defenses comes from an examination of Nineteenth Century commentaries on the law. *See*, Newell, *The Law of Libel and Slander*, 389-94 (1898); Cooley, *A Treatise on the Law of Torts*, 251-52 (1888); Pollock, *A Treatise of the Law of Torts*, 335-38 (1894); Bishop, *Commentaries on the Non-Contract Law*, 128-31 (1889).

In the period that immediately followed the Civil War, as this issue came to be litigated in the various jurisdictions, "some type of privilege was recognized in twenty five of the twenty eight jurisdictions in which appellate

court decisions and public official libel suits were recorded." Lawhorne, *The Supreme Court and Libel*, nn. 31, 32 (1981). The defense with which Lee takes issue is venerable, having existed at the time of the passage of 42 U.S.C. § 1983.

This Court has on numerous occasions examined defenses existing at the time of passage of 42 U.S.C. § 1983. *See, Briscoe v. LaHue*, ... U.S. ....., 103 S.Ct. 1108, 1113 (1983)—witness immunity; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)—previously recognized defenses; *Owen v. City of Independence, Mo.*, 445 U.S. 622-638 (1980)—incorporation of compatible immunities; *Lake Tahoe Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403-05 (1979)—regional legislators; *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 239-45 (1974); *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975)—good faith immunity; *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978)—judicial immunity; *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)—prosecutorial immunity. In no case has this Court abrogated a defense available under the common law at the time of passage of 42 U.S.C. § 1983.

The policy commanding application of privilege to statements made by a public official about the character of a previous employee is no less furthered by public policy than any of the aforementioned defenses and immunities, all of which were contemporaries in the pre-Civil War Era.

It would be a serious departure from these precedents to eviscerate the privilege, long recognized in Illinois, of an employer to comment upon the capacity of a former employee; particularly where the former employee seeks police work.

CONCLUSION

By reason of the foregoing, this Honorable Court should deny Michael Lee's Petition for Writ of Certiorari.

Respectfully submitted,

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